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No. 05-107

In the Supreme Court of the United States

WARREN DAVIS, PETITIONER

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

PAUL D. CLEMENT
Solicitor General
Counsel of Record
GREGORY G. GARRE
Deputy Solicitor General
MATTHEW D. ROBERTS
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

HOWARD M. RADZELY
Solicitor of Labor
NATHANIEL I. SPILLER
Assistant Deputy Solicitor
MARK S. FLYNN
Counsel for Advice and Statutory Programs
Department of Labor
Washington, D.C. 20210

QUESTIONS PRESENTED

1. Whether the court of appeals had jurisdiction over the district court's order remanding petitioner's claims to state court.

2. Whether petitioner's state-law claims are completely preempted by Title IV of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 481-483.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Title IV of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. 481-483, establishes substantive rules governing union elections and provides comprehensive procedures for enforcing those rules. *Trbovich* v. *United Mine Workers of Am.*, 404 U.S. 528, 531 (1972). A union member alleging violations of Title IV may file a complaint with the Secretary of Labor. 29 U.S.C. 482(a). The Secretary must investigate the complaint, determine if there is probable cause to believe that a violation of Title IV has occurred and not been remedied, and, if so, file suit to obtain relief in United States district court. 29 U.S.C. 482(b) and (c).

Title IV is explicit that "[t]he remedy provided by this [title] for challenging an election already conducted shall be exclusive." 29 U.S.C. 483. Accordingly, there is no private right of action to challenge the validity of a union election. *Local No. 82, Furniture & Piano Moving* v. *Crowley*, 467 U.S. 526, 544 (1984). However, a union member may challenge the Secretary's decision not to bring suit, *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975), and may intervene in a suit brought by the Secretary, *Trbovich*, 404 U.S. at 536.

2. Petitioner held an elected position—Director of Region 2—within respondent International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW). Pet. App. 2a, 14a. After announcing his intention not to run for reelection and endorsing his assistant director, petitioner arranged at the UAW's Constitutional Convention

for his assistant to withdraw from the election and to nominate him instead. *Id.* at 2a-3a. Petitioner won the election unopposed. *Id.* at 3a.

Petitioner was a member of an unofficial caucus of UAW officers who had informally agreed not to seek office after age 65. Pet. App. 3a. Several members of the caucus were angered by petitioner's surprise decision to run again for office at age 67. *Ibid.* Those members issued a press release stating that petitioner had lied about his plans for retirement and schemed "to deny an honest election to the membership." *Id.* at 10a. The press release called upon UAW convention delegates to eliminate Region 2, redistribute its members among three other regions, and hold new elections in the reconstituted regions. *Id.* at 3a. The delegates voted to eliminate Region 2 and divide it among the other regions. *Ibid.* Elections were held for directors of the new regions, but petitioner did not run in those elections. C.A. App. 328.

3. a. Petitioner sued the UAW in federal district court alleging a violation of Title I of the LMRDA, 29 U.S.C. 411(a)(1) and (2). Pet. App. 3a. The district court dismissed the suit on the ground that it challenged the validity of the UAW's elections and thus was within the exclusive jurisdiction of the Secretary under Title IV. *Davis* v. *UAW*, 274 F. Supp. 2d 922 (E.D. Mich. 2003). The court of appeals affirmed the dismissal. *Davis* v. *UAW*, 390 F.3d 908 (6th Cir. 2004), cert. denied, 125 S. Ct. 1984 (2005).

b. Petitioner also filed a Title IV complaint with the Secretary in which he contended that the elimination of Region 2 was invalid and that he should be installed as Region 2 Director. The Department of Labor conducted an investigation and determined that there had been no violation of Title IV. C.A. App. 328-330. The Department reasoned that the UAW's governing rules did not impose an age limitation on candidacy for union office and that the convention delegates followed the

procedures mandated by the UAW's constitution when they voted to eliminate Region 2. *Id.* at 329-330. Petitioner did not seek judicial review of the Department's determination.

4. In June 2003, petitioner filed this suit in Ohio state court against respondents. Petitioner alleged age discrimination, conspiracy to discriminate on the basis of age, wrongful discharge, retaliation, libel, and defamation, all in violation of Ohio law. Pet. App. 4a. He sought declaratory and injunctive relief, including an order directing respondents to reinstate him as Region 2 Director, as well as back pay, damages, and attorney's fees. C.A. App. 16. Respondents removed the case to federal district court. Pet. App. 4a. As relevant here, they contended that petitioner's claims were completely preempted by Title IV of the LMRDA because the claims would require a determination of the validity of the UAW's elections. *Ibid.* Petitioner filed a motion to remand the case, and the district court granted the motion. *Id.* at 12a-32a.

The district court first observed that "the exclusive remedy for challenging the results of a [u]nion election is by pursuing administrative procedures prescribed by the Secretary of Labor." Pet. App. 29a. The court noted that respondents argued that, in order to decide "one aspect of the relief sought by [petitioner]: reinstatement," the court would be forced "to choose between conflicting Union election results." *Ibid.* The court suggested that the reinstatement claim may therefore have provided the court with "federal preemption jurisdiction." *Id.* at 30a. The court believed, however, that petitioner had abandoned his request for reinstatement in his briefing on the remand motion, thus "mooting" that potentially adequate ground for "LMRDA preemption." *Ibid.*[1] The court concluded that none of petitioner's remaining grounds for

[1] The court was apparently mistaken. See Pet. App. 7a. Both parties agree that petitioner has not abandoned his claim for reinstatement. Pet. 6; Pet. C.A. Br. 11; Resp. C.A. Br. 38.

relief implicated "federal preemption jurisdiction," "necessarily impl[ied] * * * that one or more of the Union's election results were invalid," or was inconsistent with the LMRDA. *Id.* at 30a-31a. The court therefore determined that removal of the case was "not well-taken," and it remanded the case to state court. *Id.* at 32a.[2]

5. The court of appeals reversed and remanded the case to the district court with instructions to dismiss petitioner's claims as precluded by the LMRDA. Pet. App. 1a-11a.

The court first addressed its jurisdiction over the appeal in light of 28 U.S.C. 1447(d), which precludes appellate review of remands authorized by 28 U.S.C. 1447(c), such as remands for lack of subject matter jurisdiction at the time of removal. Pet. App. 6a; see *Thermtron Prods., Inc.* v. *Hermansdorfer*, 423 U.S. 336 (1976). The court determined that, "[w]here a district court had proper jurisdiction at the time of removal, but events occurring after removal make remand to the state courts appropriate, § 1447(d) does not bar appellate review of the district court's remand order." Pet. App. 6a (citing *First Nat'l Bank of Pulaski* v. *Curry*, 301 F.3d 456, 459 (6th Cir. 2002) (reviewing district court order that remanded supplemental state claims after having resolved federal claims)).

Here, the court of appeals concluded, the district court believed it possessed subject matter jurisdiction at the time of the removal. Pet. App. 7a. The court of appeals reasoned that, in deciding to remand the case, the district court "plainly relied" on its belief that petitioner had, subsequent to removal, "expressed his intent to abandon [his] claim" for reinstatement. *Ibid.* Because the district court remanded the case only after finding that this post-removal event had deprived it of jurisdiction (*i.e.*, eliminated the only federal issue

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[2] Because the district court "conclude[d] it does not have jurisdiction over the case," the court declined to rule on respondents' motions to dismiss the case and to transfer venue. Pet. App. 13a-14a.

from the case), the court of appeals concluded that it had appellate jurisdiction over the remand order. *Id.* at 7a-8a (citing *First Nat'l Bank of Pulaski*, 301 F.3d at 460).

As to the merits of the remand order, the court of appeals concluded that petitioner's state-law claims were properly removed to federal court and were preempted by the LMRDA. Pet. App. 8a-11a. The court reasoned that the claims of age discrimination, wrongful discharge, and retaliation "logically hinge on [petitioner's] assertion that he was lawfully elected," and claims for "post-election relief are relegated to the exclusive jurisdiction of the Secretary of Labor." *Id.* at 10a. The court determined that the remaining claims for libel and slander would likewise "necessarily require a court to revisit" the Secretary's determination that the UAW elections were valid. *Id.* at 11a. The court therefore held that those "claims are also preempted by Title IV of the LMRDA." *Ibid.*

DISCUSSION

The court of appeals concluded that it had appellate jurisdiction based on the well-settled rule that remand orders declining to exercise supplemental jurisdiction are subject to appellate review. That conclusion was based on the unique circumstances of this case and does not implicate any conflict among the courts of appeals that warrants this Court's plenary review. The court of appeals' determination that this case was properly removed to federal court also does not warrant review. There is no conflict among the courts of appeals on whether the LMRDA completely preempts state-law claims challenging the validity of union elections. The question whether there can be complete preemption when the plaintiff cannot invoke an alternative federal cause of action is not properly before the Court. In any event, this case is not an appropriate vehicle through which to resolve that abstract question. The petition for a writ of certiorari should therefore

be denied. Alternatively, the Court may wish to hold the petition pending the Court's decisions in *Kircher* v. *Putnam Funds Trust*, No. 05-409 (argued Apr. 24, 2006), and *Osborn* v. *Haley*, cert. granted, No. 05-593 (May 13, 2006), which involve the application, in different contexts, of 28 U.S.C. 1447(d).

I. THE APPELLATE JURISDICTION QUESTION DOES NOT WARRANT PLENARY REVIEW

A. The Court Of Appeals Based Its Jurisdiction On The Established Rule That Remand Orders Declining Supplemental Jurisdiction Are Subject To Appellate Review

Section 1447(d) provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." 28 U.S.C. 1447(d).[3] This Court has stated, however, that Section 1447(d) must be read *in pari materia* with 28 U.S.C. 1447(c) and therefore bars appellate review only of remands based on the grounds covered by Section 1447(c). *Thermtron Prods., Inc.* v. *Hermansdorfer*, 423 U.S. 336, 345-346 (1976); *Things Remembered, Inc.* v. *Petrarca*, 516 U.S. 124, 127-128 (1995). If a remand is based on a ground not covered by Section 1447(c), Section 1447(d) does not necessarily foreclose appellate review. *Thermtron*, 423 U.S. at 345; *Things Remembered*, 516 U.S. at 127.

One ground for remand not covered by Section 1447(c) is a remand of supplemental state-law claims for one of the reasons set forth in 28 U.S.C. 1367(c). For example, when the federal claim in a case is dismissed or abandoned, the district court may remand the case if the court concludes that it is inappropriate to retain jurisdiction over the state-law claims. *Carnegie-Mellon Univ.* v. *Cohill*, 484 U.S. 343, 357 (1988).

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[3] Section 1447(d) excepts from its scope remands in civil rights cases removed under 28 U.S.C. 1443. That exception is not implicated here.

Although this Court has not addressed the question, see *Things Remembered*, 516 U.S. at 129-130 (Kennedy, J., concurring), the courts of appeals have uniformly concluded that remands declining supplemental jurisdiction are subject to appellate review. See 16 James W. Moore et al., *Moore's Federal Practice* § 107.44[2][d], at 107-262 n.53.5 (3d ed. 2006) (citing cases).

The court of appeals relied on that rule in concluding that it had appellate jurisdiction here. The court observed that the district court "plainly relied" on petitioner's purported abandonment of his reinstatement claim "in remanding the case." Pet. App. 7a. "Because the district court remanded [the] case only after finding that [this] post-removal event had deprived it of subject matter jurisdiction," the court of appeals concluded that appellate jurisdiction was proper. *Ibid.* The court explained that, "[w]here a district court had proper jurisdiction at the time of removal, but events occurring after removal make remand to the state courts appropriate, § 1447(d) does not bar appellate review." *Id.* at 6a. The court supported that proposition with a citation to *First National Bank of Pulaski* v. *Curry*, 301 F.3d 456, 459 (6th Cir. 2002), a case in which it had reviewed a district court order remanding supplemental state claims after the court had resolved the federal claims in the case.

Some language in the opinion below could be read to suggest that the decision rested on different reasoning. See, *e.g.*, Pet. App. 7a (referring to a conclusion by the district court that "subject matter jurisdiction had been lost" rather than a discretionary decision by that court not to exercise supplemental jurisdiction). But the court of appeals has clarified its rationale in a subsequent decision. In *DaWalt* v. *Purdue Pharma, L.P.*, 397 F.3d 392 (2005), the Sixth Circuit stated that the post-removal event "doctrine is implicated only when a district court makes a discretionary remand of pendent

state-law claims following the dismissal of a claim or a party." *Id.* at 401. The court cited this case as an example, describing it as a case "reviewing the district court's remand order when a party had 'expressed his intent to abandon [a] claim,' thus converting a case over which the court had subject matter jurisdiction into a case that the district court could remand in its discretion under § 1367." *Ibid.* (quoting Pet. App. 7a). *DaWalt* therefore makes clear that this case does not stand for any broader proposition in the Sixth Circuit.

B. Review Is Not Warranted To Address The Reviewability Of Remand Orders Declining Supplemental Jurisdiction

Petitioner contends (Pet. 16-20) that this Court should grant certiorari to decide whether the court of appeals was correct in concluding that remand orders declining supplemental jurisdiction are subject to appellate review. But there is no reason for this Court to address that question. Petitioner himself acknowledges that all of the courts of appeals that have addressed the issue agree that remand orders declining supplemental jurisdiction are reviewable. Pet. 10; Pet. Reply 4. Moreover, the uniform view of the courts of appeals appears to be consistent with this Court's decisions, which suggest that appellate review is barred only for the categories of remand orders described in Section 1447(c)—*i.e.*, those based on lack of subject matter jurisdiction and those based on other defects in removal. See *Thermtron*, 423 U.S. at 346; *Things Remembered*, 516 U.S. at 127; 28 U.S.C. 1447(c).

Even if this Court's guidance were needed on the question whether remand orders declining supplemental jurisdiction are subject to appellate review, this case would not be an appropriate vehicle through which to provide that guidance. Although the court of appeals treated the case as one in which the district court had declined jurisdiction under 28 U.S.C. 1367(c), it acknowledged that the district court had operated

on the erroneous belief that petitioner had abandoned his reinstatement claim. See note 1, *supra*. Moreover, rather than simply correct that error and remand to the district court, the court of appeals went on to rule that petitioner's claims were properly removed, an issue that would not otherwise have been appealable. If the district court had realized that the reinstatement claim had not been abandoned or the court of appeals had done no more than correct that error and remand, then the district court would have had only two options: (1) retain jurisdiction over the entire case on the theory that the LMRDA completely preempts the reinstatement claim or (2) remand the case on the theory that there is no complete preemption and therefore the court lacked jurisdiction at the time of removal. Neither option would have involved a remand under Section 1367(c), and neither option would have produced an immediately appealable order.

This Court should not address the propriety of appellate review of remand orders under Section 1367(c) in a case that, but for the district court's acknowledged factual error, could not possibly involve a valid remand under that Section. The peculiarity created by the district court's mistaken belief that petitioner had abandoned the reinstatement claim makes this a poor vehicle through which to address that issue.

C. Any Tension Among The Courts Of Appeals On How To Ascertain The Basis For A Remand Order Does Not Warrant Review In This Case

Petitioner contends (Pet. 11-15) that the Court should grant review because the courts of appeals disagree on whether they may look beyond the face of a remand order to determine the actual basis for the remand. Although there may be some tension among the courts of appeals on how to ascertain the basis for a remand order, this Court's review of that question in this case would be premature.

Contrary to petitioner's portrayal of a deep split among the courts of appeals, those courts generally agree that they may analyze a remand order to determine if there is a non-Section 1447(c) basis for the remand, even if the district court has stated that it lacks jurisdiction or has cited 28 U.S.C. 1447(c) or (d). See *Cogdell* v. *Wyeth*, 366 F.3d 1245, 1247-1249 (11th Cir. 2004); *Lindsey* v. *Dillard's, Inc.*, 306 F.3d 596, 599 (8th Cir. 2002); *Archuleta* v. *Lacuesta*, 131 F.3d 1359, 1362 (10th Cir. 1997); *Mangold* v. *Analytic Servs., Inc.*, 77 F.3d 1442, 1450 (4th Cir. 1996); *Baldridge* v. *Kentucky-Ohio Transp., Inc.*, 983 F.2d 1341, 1349 (6th Cir. 1993). Cf. *Spielman* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116, 128 (2d Cir. 2003) (analyzing ambiguous order to determine basis for remand); *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 708 (7th Cir. 1992) (same).[4]

Statements in some cases suggest that the Fifth Circuit takes a more restrictive approach and views the district court's characterization of its remand order as controlling. The Fifth Circuit has said that "[r]eviewability of a remand order depends entirely upon the trial court's stated grounds

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[4] Petitioner contends (Pet. 12, 15) that the Tenth Circuit treats a district court's good-faith statement that it lacked jurisdiction as conclusively establishing that the remand order was based on Section 1447(c). That is incorrect. In *Archuleta*, the Tenth Circuit held that, notwithstanding "[a] district court's assertion that it lacks subject matter jurisdiction, and even explicit references to § 1447(c)," the court of appeals "will determine by independent review the actual grounds upon which the district court believed it was empowered to remand." 131 F.3d at 1362. Petitioner also misreads the Third Circuit's statement in *Balazik* v. *County of Dauphin*, 44 F.3d 209, 213 (1995), that appellate "review is forestalled only when the *stated reasons* for the remand include procedural or jurisdictional defects." In making that statement, the court meant only that "review is not proscribed even if a remand could have been ordered based on a § 1447(c) ground, but was not." *Ibid.* The court nowhere suggested that it could not analyze a remand order to determine the basis on which the district court actually remanded the case.

for its decision to remand." *Tillman* v. *CSX Transp., Inc.*, 929 F.2d 1023, 1026 (5th Cir.), cert. denied, 502 U.S. 859 (1991). That court of appeals has also said that it will deny appellate review pursuant to Section 1447(d) where the district court has stated that it is remanding for lack of jurisdiction, unless "the district court [has] 'clearly and affirmatively' relie[d] on a non-§1447(c) basis" for the remand. *Heaton* v. *Monogram Credit Card Bank*, 231 F.3d 994, 997 (5th Cir. 2000) (quoting *Copling* v. *Container Store, Inc.*, 174 F.3d 590, 596 (5th Cir. 1999)), cert. denied, 533 U.S. 915 (2001).

The apparent tension in methodology between the Fifth Circuit and the other courts of appeals does not warrant this Court's review at this time. First of all, it is not clear that this kind of disparate methodology gives rise to the type of circuit split that merits this Court's review. Unlike disagreements on broader issues of law, this kind of methodological dispute may have more impact on how district court judges draft remand orders than on the rights of the parties.

Second, it is also unclear how much practical difference there is between the two approaches. Like the other courts of appeals, the Fifth Circuit recognizes that it must examine the remand order to determine whether the district court intended to state a Section 1447(c) ground for remand and that there may be ambiguities in the order that require resolution. For example, in *Heaton*, the court of appeals undertook "a plain and common sense reading" of the remand order before concluding that the "order reveals that [the district court] stated a § 1447(c) basis for remand," and the court of appeals analyzed the order to determine that there was no "'mislabeling' of the basis for remand." 231 F.3d at 997-998. Moreover, in describing a prior decision, the court explained that "elucidation of the grounds for remand was required in order to determine the district court's reasons for remanding"

because "the remand order * * * was at first glance somewhat ambiguous." *Id.* at 998.

Third, even if the Fifth Circuit's different approach may have a practical impact, that court might still align itself with the other courts of appeals without this Court's intervention. The Fifth Circuit has not addressed the issue in an *en banc* opinion. And there is some tension between the Fifth Circuit's approach and this Court's cases on appellate jurisdiction. This Court's cases indicate that "[t]he label attached by the District Court to its own opinion does not, of course, decide * * * the jurisdictional issue," and that the appellate court must "determin[e] * * * the appealability of the trial court's action not by the name the court gave [its decision] but by what in legal effect it actually was." *United States* v. *Sisson*, 399 U.S. 267, 279 n.7 (1970) (citations omitted); see *Sullivan* v. *Finkelstein*, 496 U.S. 617, 628 n.7 (1990) (stating that "[t]he label used by the District Court * * * cannot control the order's appealability in this case").

If the Fifth Circuit's approach proves both significant and persistent, this Court could grant review in an appropriate case from the Fifth Circuit to correct the problem. This case, however, is not a good one in which to resolve any tension between the Fifth Circuit and the other courts of appeals. The Sixth Circuit may well have decided this case the same way even if it followed the Fifth Circuit's approach. Although the court of appeals here clearly engaged in some exegesis, it looked to the text of the district court's order in ascertaining the basis for the remand. The remand order did not invoke Section 1447(c) and did not state that the district court lacked jurisdiction *at the time of removal*.[5] On the con-

[5] The district court stated that it was not ruling on certain motions "[g]iven that [it] concludes it does not have jurisdiction over the case." Pet. App. 13a-14a. But courts sometimes use the term jurisdiction imprecisely. See *Kontrick* v. *Ryan*, 540 U.S. 443, 454 (2004). And it is far from clear

trary, as the court of appeals noted, the remand order "plainly relied" on petitioner's purported abandonment of his claim for reinstatement. Pet. App. 7a. The court of appeals therefore concluded that the order indicated that the district court believed it had jurisdiction at the time of removal and thus was not relying on Section 1447(c). See *ibid.* Instead, the court of appeals determined, the remand was clearly based on a non-Section 1447(c) ground—the district court's conclusion that a post-removal event had eliminated any federal claims from the case and "[made] remand to the state courts appropriate." *Id.* at 6a; see *id.* at 7a-8a.

D. The Court May Wish To Hold This Case Pending Its Decisions in *Kircher* and *Osborn*

As petitioner observes (Pet. 13-14), there is a conflict among the courts of appeals regarding appellate jurisdiction over remand orders issued under the Securities Litigation Uniform Standards Act of 1998 (SLUSA). That conflict is not presented here but is at issue in *Kircher*, No. 05-409. Specifically, *Kircher* presents the question whether 28 U.S.C. 1447(d) precludes appellate jurisdiction over remand orders issued after the district court has determined that claims, which were originally removed under SLUSA's removal provision, do not fall within the scope of SLUSA's preemption provision. See 15 U.S.C. 77p(c) and (d)(4), 78bb(f)(3)(D). The Court's resolution of that question is likely to turn primarily on factors unique to the SLUSA statutory scheme. Nonetheless, to the extent the Court's decision in *Kircher* sheds light on the proper interpretation of Section 1447(d), the Court

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that the district court here meant that it did not have jurisdiction *at the time of removal*, which is the critical inquiry under Section 1447(c), *Pullman Co.* v. *Jenkins*, 305 U.S. 534, 537 (1939), as opposed to meaning that it no longer had jurisdiction because it had decided to remand the state-law claims.

may wish to hold the petition in this case pending that decision.

The Court may also wish to hold the petition in this case pending the Court's decision in *Osborn*, No. 05-593. In that case, this Court has asked the parties to brief the question whether Section 1447(d) bars appellate review of an order that overturns the substitution of the United States for a federal employee defendant under the Westfall Act, 28 U.S.C. 2679(d), and also remands the case to state court. Like *Kircher*, *Osborn* may provide guidance on how to interpret Section 1447(d). The Court may therefore wish to defer action on this case until the Court has resolved *Osborn* as well. However, because of the different contexts in which Section 1447(d) arises in this case and in *Osborn* and *Kircher*, and because this case does not independently warrant review, it would also be appropriate for the Court to deny the petition rather than carry this case on the Court's docket for a lengthy period of time.

II. THE COMPLETE PREEMPTION QUESTION IS NOT PROPERLY PRESENTED AND, IN ANY EVENT, DOES NOT WARRANT PLENARY REVIEW

Petitioner also seeks review (Pet. 20-26) of the court of appeals' ruling on the merits of the removal question that this case was properly removed to federal court. The issue framed by petitioner is not properly presented and, in any event, does not warrant this Court's review.

Under 28 U.S.C. 1441(b), a civil action filed in state court may be removed to federal court if the plaintiff's claim "aris[es] under" federal law. See *Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 6 (2003). Whether an action arises under federal law is determined by the well-pleaded complaint rule, which requires that a federal question be presented by the plaintiff's properly-pleaded complaint. Because a defense

is not part of the plaintiff's well-pleaded statement of his claim, and federal preemption is ordinarily only a defense, preemption generally does not provide a basis for removal. *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 207 (2004). Preemption does provide a basis for removal, however, when a federal cause of action occupies the field within which the plaintiff's claim arises and therefore "wholly displaces" any state-law causes of action on which the plaintiff might otherwise rely. *Beneficial Nat'l Bank*, 539 U.S. at 8. Where such "complete preemption" exists, the plaintiff's properly-pleaded claim "necessarily arises" under federal law even if the plaintiff purports to base the claim entirely on state law. *Id.* at 9; see *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 393 (1987) (citing *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 24 (1983)). Generally, there are two prerequisites for complete preemption: (1) Congress must have created an "exclusive cause of action," and (2) the plaintiff's claim must "come[] within the scope of that cause of action." *Beneficial Nat'l Bank*, 539 U.S. at 8-9; see *Franchise Tax Bd.*, 463 U.S. at 24; *Caterpillar*, 482 U.S. at 388-399.

Petitioner contends that the LMRDA does not completely preempt his state-law claims because, although it gives the Secretary of Labor an exclusive cause of action to challenge the UAW's election on petitioner's behalf, the statute does not give petitioner himself a cause of action. That issue does not warrant review. There is no conflict among the courts of appeals on whether there can be complete preemption by the LMRDA. Indeed, no court, including the Sixth Circuit in this case, has squarely addressed the issue. And the abstract question whether there can ever be complete preemption when the plaintiff himself lacks a federal cause of action is not properly presented by this case, because it was not pressed or passed upon below.

A. There Is No Conflict Among The Courts Of Appeals On Whether The LMRDA Completely Preempts State-Law Claims Challenging Union Elections

The Sixth Circuit in this case is the only court of appeals that has addressed the propriety of removing ostensible state-law claims to federal court based on Title IV of the LMRDA. Even that court, however, did not conduct a traditional complete preemption analysis as set out in this Court's cases. See Pet. App. 8a-11a. Instead, the court of appeals referred generically to preemption and may have decided this case based on the erroneous premise that ordinary preemption is sufficient to justify removal. See *id.* at 11a (reasoning that remand was improper because petitioner's claims were "preempted by Title IV of the LMRDA"). Thus, there is no conflict among the courts of appeals on whether the LMRDA satisfies the requirements for *complete* preemption. Indeed, no court of appeals has squarely addressed that question. It would therefore be premature for this Court to address the issue here.

B. The Complete Preemption Question Presented By Petitioner Is Not Properly Before The Court

Petitioner contends (Pet. 20-26) that the Court should grant review to resolve a conflict in the courts of appeals over whether a claim can be completely preempted by a federal statute that does not provide the plaintiff with a private cause of action. That issue is not properly presented in this case.

Petitioner did not argue in the court of appeals that there is no complete preemption here because the LMRDA does not provide him with a cause of action. Petitioner does not dispute his failure to raise that issue below, but he contends that the issue is merely "a new argument" in support of his claim that there is no complete preemption. Pet. Reply 6. Far from being an additional argument in support of that claim, how-

ever, the cause-of-action question is the only complete-preemption issue that petitioner asks this Court to resolve. The question presented in the petition is framed entirely in terms of whether complete preemption can occur "absent a determination that Congress created an alternative private right of action." Pet. i. Because petitioner did not present that issue to the court of appeals, that court did not address the issue.

This Court does not generally address issues that were neither pressed nor passed upon in the court below. See, *e.g.*, *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). There is no reason for the Court to make an exception here.

C. The Novel And Abstract Nature Of The Complete Preemption Question Also Counsels Against Review

Even if the complete preemption question raised by petitioner were properly presented, this case would not be an appropriate one in which to address it. The question whether a federal statute can completely preempt a plaintiff's state-law claims if it does not provide the plaintiff with a cause of action should not be addressed in the abstract. Rather, it should be addressed in the context of a specific statute, and in light of judicial decisions carefully construing the statute, because the answer to the question may vary depending on the particular features of the statutory scheme. No court of appeals has addressed the cause-of-action question in the context of the LMRDA. There is no reason for this Court to attempt to resolve it in the first instance.[6]

The LMRDA falls within the class of federal statutes that displace state causes of action, provide a substitute federal

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[6] Moreover, the Court could not address the complete preemption issue without first deciding whether the court of appeals correctly exercised appellate jurisdiction, a question which, as explained above, implicates idiosyncratic aspects of the decision below and is not worthy of plenary review.

cause of action, but strictly limit the class of plaintiffs who can invoke that cause of action. The LMRDA creates an exclusive federal cause of action to challenge union elections but allows only the Secretary of Labor to invoke that cause of action. See 29 U.S.C. 482(b); *Local No. 82, Furniture & Piano Moving* v. *Crowley*, 467 U.S. 526, 544 (1984). For that category of statutes, the first prerequisite for complete preemption is clearly met: there is an exclusive federal cause of action. The complete preemption inquiry therefore can be understood as turning on whether the second requirement is met, *i.e.*, whether the plaintiff's claim comes within the scope of the federal cause of action. See p. 15, *supra*.

Some of this Court's precedents indicate that the fact that a particular plaintiff is not entitled to invoke a cause of action means that his claim is not within the scope of that cause of action. For example, in *Franchise Tax Board*, this Court held that Section 502(a) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. 1132(a), did not completely preempt a suit for back taxes by a state tax board against an employee benefit plan because the suit did not "come[] within the scope of one of ERISA's causes of action." 463 U.S. at 25. The Court reasoned that Section 502(a) does not provide a cause of action to anyone other than "participants, beneficiaries, or fiduciaries," and therefore "[a] suit for similar relief by some other party [like the tax board] does not 'arise under' that provision." *Id.* at 27.

Other of the Court's precedents, however, suggest that a plaintiff's ineligibility to invoke a federal cause of action does not conclusively establish that his claim is outside the scope of that cause of action. In *Avco Corp.* v. *Aero Lodge No. 735, International Ass'n of Machinists*, 390 U.S. 557 (1968), this Court held that an employer's state lawsuit seeking an injunction prohibiting a union from striking fell within the scope of Section 301 of the Labor-Management Relations Act, 29

U.S.C. 185, and was completely preempted, even though the Norris-LaGuardia Act barred the employer from seeking the injunction under Section 301. See 390 U.S. at 560-561. *Avco* demonstrates that a plaintiff's ostensible state-law claim may come within the scope of a federal cause of action and be completely preempted, even if the cause of action does not provide the plaintiff with a remedy. *Caterpillar*, 482 U.S. at 391 n.4. *Avco* thus supports an argument that a plaintiff's claim may fall within the scope of a federal cause of action and be completely preempted, even if the plaintiff is unable to state a valid claim under the cause of action, provided that the plaintiff's claim is within the field regulated by the cause of action. Moreover, when the limits on the federal cause of action are an integral part of the federal scheme, it would seem counterintuitive to find a claim to be not completely preempted precisely because it seeks relief antithetical to the pervasively federal regime.

There is a reasonable argument that private-party claims challenging union elections fall within the field addressed by the LMRDA's exclusive cause of action. The LMRDA makes clear that the remedy it provides is the exclusive means to challenge those elections. 29 U.S.C. 483. Although only the Secretary can bring suit to challenge election results, the Secretary's suit is triggered by a complaint filed by a private party who is aggrieved by the results. 29 U.S.C. 482(a). The Secretary is required to bring suit if there is probable cause to believe that there has been an unremedied violation of the LMRDA that may have affected the outcome of the election. 29 U.S.C. 482(b) and (c). The aggrieved party may seek judicial review of a decision by the Secretary not to bring suit and may intervene in a suit once it has been brought. See *Dunlop* v. *Bachowski*, 421 U.S. 560, 566 (1975); *Trbovich* v. *United Mine Workers of Am.*, 404 U.S. 528, 536 (1972).

Given the unique nature of the LMRDA's remedial scheme and the case law discussed above, whether the cause of action provided by the LMRDA gives rise to complete preemption is not free from doubt. Because that question has not arisen with any frequency, has not yet been squarely addressed by any court of appeals, and is not properly presented in this case, this Court should not undertake to resolve the question here.

CONCLUSION

The petition for a writ of certiorari should be denied. Alternatively, the Court may wish to hold the petition pending the Court's decisions in *Kircher*, No. 05-409, and *Osborn*, No. 05-593.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
GREGORY G. GARRE
Deputy Solicitor General
MATTHEW D. ROBERTS
Assistant to the Solicitor General

HOWARD M. RADZELY
Solicitor of Labor
NATHANIEL I. SPILLER
Assistant Deputy Solicitor
MARK S. FLYNN
Counsel for Advice and Statutory Programs
Department of Labor

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